Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: December 4, 1997
CASE NO: 96-INA-194

In the Matter of:

RUBEN ESQUIVEL
Employer

On Behalf of:

SALVADOR ZAMBRANO
Alien

Appearance: Mary Elizabeth Orr, Esq.
San Juan Capistrano, CA
For the Employer

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27 (c).

Statement of the Case

On December 29, 1993, Ruben Esquivel ("employer") filed an application for labor certification to enable Salvador Zambrano ("alien") to fill the position of "cook, domestic service" at an hourly wage of $11.58 (AF 35). The job duties are described as follows:

> The occupant of this position will be required to cook, season and prepare a variety of meat, fish, chicken, rice dishes, including soups, saladas according to my instructions or drawing on own recipes and cooking skills. Will be required to plan menus and order foodstuffs.

The employer's job requirements were two years of experience in the job offered or in the related position of restaurant cook.

On June 2, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited violations of several regulations including § 656.21 (b) (6) which provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. The CO found that the employer failed to provide lawful, job-related reasons for the rejection of Applicants Diane Werts and Arlene Large. The CO noted that Ms. Large stated that the employer contacted her at 10:30 p.m. The CO also found that the employer was not in compliance with § 656.21 (g) which provides that the job advertisement must indicate the minimum job requirements including the rate of pay. Finally, the CO determined that the employer failed to comply with § 656.21 (a) (3) (ii) which provides that where an application involves a job offer as a live-in domestic worker, the employer must submit two copies of the contract of employment.

In a Supplemental NOF [2] issued June 21, 1995, the CO found that the employer did not document that the position constituted full-time, permanent employment as provided by § 656.3. The CO therefore requested that the employer submit evidence indicating the number of meals to be prepared daily and weekly, the length of time to prepare the meals, whether the employer

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

[2] The CO explained that he issued the Supplemental NOF because of "recent policy changes within the Labor Department with regard to domestic cooks" (AF 8).

entertains guests frequently, and whether the employee will be required to perform duties other than cooking. The CO also determined that the employer violated § 656.21 (b) (2) (I) which provides that where a job opportunity involves a requirement that the worker live on the employer's premises, the employer shall document that the requirement arises out of business necessity. The CO noted that household cooks are not normally required to live on the business premises (AF 22). The CO informed the employer that he had 35 days from the date of the Supplemental NOF to file a rebuttal.

In rebuttal, dated July 11, 1995, the employer argued that he interviewed Applicant Wert over the telephone and she informed him that she was returning to another job she had held in the past. The employer acknowledged that he contacted Ms. Large at 10:30 p.m., but only after other attempts to contact her during the daytime were unsuccessful. Additionally, the employer stated that Ms. Large was looking for temporary work. The employer also asserted that he did not require the worker to live on the work premises, and thus maintained that he was not required to submit an employment contract pursuant to § 656.21 (a) (3) (ii) (AF 17).

The CO issued the Final Determination on July 26, 1995 denying the certification application. The CO found that the employer did not provide lawful job-related reasons for rejecting the two U.S. workers. The CO emphasized that Ms. Werts was told by the employer that she would be expected to work 14 hours per day six days per week, and that some child care would be involved. The CO also refused to accept the employer's justification that Ms. Large was rejected because she was looking for temporary work. The CO found that Ms. Large gave no indication that she was looking for temporary work and thus was a qualified, willing, able and available applicant. The CO also found that the employer failed to rebut or cure all of the deficiencies in the original and supplemental Notices and therefore concluded that certification must be denied (AF 11). On August 8, 1995, the employer requested administrative review of Denial of Labor Certification (AF 1).

Discussion

The issue presented by this appeal is whether an employer's application may be denied where the employer fails to rebut or cure all of the CO's determinations in the Notice of Findings.

In the original and supplemental NOFs, the CO found that the employer did not meet five regulatory criteria, and therefore instructed the employer to rebut or cure the following issues: (1) unlawful rejection of U.S. workers, (2) lack of specificity in the job advertisement, (3) failure to submit employment contract, (4) full-time, permanent employment, and (5) unduly restrictive live-in requirement (AF 8).

Despite the CO's explicit instructions, the employer failed to address whether the offered position constituted full-time, permanent employment. The CO gave the employer notice of this deficiency in the Supplemental NOF and afforded the employer adequate time to respond to this finding. Section 656.25 (e) provides that the employer's rebuttal evidence must address all of the

findings in the NOF and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that a CO's finding which is not addressed in rebuttal may be deemed admitted. *Belha Corp.* , 88-INA-24 (May 5, 1989) (*en banc*); *Gemmel and Associates*, 93-INA-482 (June 3, 1994); *Mr. & Mrs. Mohammad Yusuf*, 93-INA-334 (July 22, 1994); *Ida Lubliner*, 93-INA-150 (Sept. 26, 1994); *Armrest Security*, 93-INA-240 (Nov. 3, 1994); *Mr. & Mrs. Sidney R. Siben*, 93-INA-236 (Nov. 29, 1994). Since the employer failed to rebut the full-time employment issue, we find certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.